United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

163

In The

United States Court of Appeals

For the District of Columbia Circuit

No. 24,506

United States of America

v.

Donald E. Anderson,

Appellant

Appeal from the United States District

Court for the District of Columbia

George B. Haddock
1776 K Street, N. W.
Washington, D. C. 20006
Attorney for Appellant
(Appointed by this Court)

INDEX

TABLE OF AUTHORITIES CITED

---

* Cases or authorities chiefly relied upon

In The

United States Court of Appeals

For the District of Columbia Circuit

No. 24,506

United States of America

v.

Donald E. Anderson,

Appellant

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant, Donald E. Anderson, appeals from orders of the United States District Court for the District of Columbia, entered on February 10, 1970, and July 30, 1970, denying motions by appellant to vacate sentence and judgment in Criminal Case No. 786-60, under 28 U.S.C. § 2255.

On December 10, 1969, appellant filed a motion to vacate sentence and judgment and for a hearing under 28 U.S.C. § 2255. This motion was denied by the District Court on February 19, 1970, without a hearing. An application for reconsideration was submitted by appellant, which was denied by the District Court on June 24, 1970, and leave to appeal without prepayment of costs was granted. Notice of Appeal was filed on June 24, 1970.

On June 24, 1970, appellant submitted a second motion to vacate sentence and judgment and for a hearing under 28 U.S.C.A. 2255, on the same grounds as the final motion. This second motion was denied by the District Court on July 30, 1970.

The appeal was docketed August 3, 1970.

On November 2, 1970, counsel was appointed to represent appellant on this appeal, and the time for filing appellant's brief was extended for sixty days. The time for filing appellant's brief was extended to February 1, 1971, by order of this Court.

This case has been before this Court on two previous occasions under the same title, to-wit, United States v. Donald E. Anderson, Nos. Misc. 1664 and 17,142 (1961 term) and 18,776 (1963 term). However, neither of the two prior appeals involved the issue presented now for review, which is raised here for the first time.

Appellant is presently confined in the federal penitentiary at Leavenworth, Kansas.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

This appeal presents the following question:

1. Did the United States District Court commit reversible error in denying appellant's motion to vacate sentence and judgment without a hearing?

STATEMENT OF THE CASE

A. References and Rulings

The order of the District Court entered February 19, 1970, denying appellant's motion to vacate sentence and judgment without a hearing.

The order of the District Court entered June 24, 1970, denying appellant's request for reconsideration and granting leave to appeal, which was noted at the bottom of appellant's letter of April 23, 1970, requesting reconsideration.

B. History of Litigation

On September 26, 1970, appellant was indicted for housebreaking and robbery committed on August 19, 1960. On May 1, 1960, after trial, appellant was found guilty as charged. Appellant appealed from the judgment of conviction, and this Court summarily reversed the judgment and remanded the case for new trial on September 26, 1962. Nos. Misc. 1664 and 17,142 (1962).

On June 10, 1964, appellant was re-tried and was again convicted and was sentenced to serve four to fourteen years. This conviction was appealed to this Court, and the judgment was affirmed. No. 18,776 (1965).

The issues raised by this present appeal have not been previously considered or determined.

C. Facts and Circumstances Surrounding Identification of Appellant

On the night of August 19, 1970, Samuel J. Cardia answered his doorbell and an intruder with a gun forced his way into the hallway, pushing Mr. Cardia to the floor (Tr. 18, 19).[1/] The intruder told Mr. Cardia to stay on the floor. While lying there, Mr. Cardia saw his wife run past the hallway toward the back door (Tr. 19). The intruder then made Mr. Cardia get to his feet and go into the living room and lie down on the fireplace hearth. The intruder demanded money, and Mr. Cardia went to his desk across the room and got money from a drawer. The intruder took the money and fled (Tr. 20, 21, 29). There is some discrepancy between the description of the robber which Mr. Cardia gave to the police the night of the robbery and the description given in court. At the

---

1/ All references to the transcript are to the certified record of the official Court Reporter, Proceedings before Judge John J. Sirica, June 9 and 10, 1964.

trial, Mr. Cardia said the robber had on a hat, sunglasses and a "beatnik" painted on his chin with mascara (Tr. 21, 33). He had a "five o'clock shadow on his beard" (Tr. 34). According to the testimony of the investigating officer, Detective Sergeant Kragh, Mr. and Mrs. Cardia described the robber as a white male, 30 to 35 years old, 5'7" or 5'8" tall, weight about 140 pounds, thin face, black hair, with a "small, black beard, running from ear to ear along the jawline," with some make-up on the face, wearing a hat and sunglasses (Tr. 76). In further conversation with Detective Kragh, Mr. Cardia described the robber as having a "beatnik-type beard" with heavy five o'clock shadow (Tr. 80).

Mrs. Cardia testified at trial that when her husband went to answer the doorbell, she stepped into the bathroom where she heard a scuffle and stepped back into the hallway where she looked toward the entrance and saw the robber. She ran from the house to get help (Tr. 66). She left immediately when she saw the robber (Tr. 69). She gave the police officers a description of a man of small stature, sharp features, with a heavy, dark bearded face, wearing a hat and sunglasses. The face was unshaven, a heavy bearded face (Tr. 70, 71).

On September 2, 1960, Mr. Cardia was shown by the police a long range picture of appellant. Mr. Cardia could not make a positive identification. The police then showed him a picture of appellant in a newspaper. He recognized

the picture as that of the robber (Tr. 42, 45). The police then showed Mr. Cardia five or six photographs, and Mr. Cardia identified a picture of appellant (Tr. 86, 45, 46). The same photographs were also shown to Mrs. Cardia on September 2, 1960, and she identified a picture of appellant (Tr. 87).

On September 9, 1970, Mr. and Mrs. Cardia attended a police line-up of five men, and both identified appellant as the robber. The photograph of the police line-up was introduced in evidence by the Government (Tr. 74, 75).

A notation in the records of this case shows that the photograph of the line-up was returned to the Assistant United States Attorney on the same day that judgment was entered. The photograph is not a part of the record in this Appeal.

The men in the line-up were not of the same build, and they were not dressed approximately the same (Tr. 37).

The other men in the line-up were far heavier and taller than appellant, and they were all dressed in regular street attire (Affidavit, Exhibit A). Appellant was dressed in beach wear, consisting of a T-shirt, calf length trousers and shower thongs. (Motion of December 4, 1969; Affidavit, Exhibit A.) He was the only man in the line-up who met the general description of the robber given to the police at the time of the robbery (Affidavit, Exhibit A).

ARGUMENT

THE UNITED STATES DISTRICT COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S MOTION TO VACATE SENTENCE AND JUDGMENT WITHOUT A HEARING

Section 2255 of Title 28, U.S.C.A., provides in part as follows:

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> "A motion for such relief may be made at any time.
>
> "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.
>
> * * *
>
> "An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus."

The motion of appellant is based upon the ground that the judgment and sentence were imposed in violation of the

Fourteenth Amendment to the Constitution of the United States, in that he was denied due process of law by reason of the procedure followed in his identification.

A motion under 28 U.S.C. § 2255, based on denial of due process in violation of the Fourteenth Amendment, may be made at any time after sentencing regardless of the length of time that has elapsed. Stovall v. Denno, 388 U.S. 293 (1967); Poole v. United States, 102 U.S.App.D.C. 71, 250 F.2d 396 (CADC, 1957); Juelich v. United States, 300 F.2d 381 (CA 5, 1962).

No hearing was held upon the motion of appellant, and the court made no findings of fact or conclusions of law. The files and records of the case do not conclusively show that the prisoner is entitled to no relief, and the court erred in its denial of the motion without a hearing.

The issue of the legality of the photographic and police line-up identifications of appellant, and the subsequent in-court identification, was raised for the first time by the motion of appellant, filed on December 10, 1969. The only files and records of the case that relate to the pretrial and in-court identifications of appellant are the transcript of trial. There is nothing to show that the district court examined the transcript of trial before he denied the motion. The court could not have examined the photograph of the police line-up, as the record shows that this photograph was returned to the office of the United States attorney at

the conclusion of the trial in 1964. There is nothing in the record which controverts or disputes the claim of appellant that he was distinctively garbed in beachwear, contrasted with the street clothing of the other men in the line-up, and that he was the only man in the line-up who conformed to the general description of the robber which had been given to the police by the victims at the time of the robbery.

There is nothing in the record upon which the trial court could make a conclusive determination that the pre-trial identification procedures were not "so impermissively suggestive as to give rise to a very substantial likelihood of irreparable misidentification" Simmons v. United States, 390 U.S. 377, 384 (1968), or "so unduly prejudicial as to taint" the conviction Clemons v. United States, 133 U.S.App.D.C. 27, 407 F.2d 1230, 1249 (CADC, 1968).

The instant case presents a situation similar to those in Machibroda v. United States, 368 U.S. 487 (1962) and Sanders v. United States, 373 U.S. 1 (1963). In Machibroda a motion under Sec. 2255 stated that pleas of guilty were induced by promises of the District Attorney and by threats of prosecution for other offenses. The Supreme Court held that the issues raised by the motion were not conclusively determined by the motion or the files and records in the case. The Court said that the factual assertions of the petitioner, while improbable, "cannot at this juncture be said to be

incredible," and that "if the allegations are true, the petitioner is clearly entitled to relief." (p. 496) A hearing on the motion was ordered.

In Sanders, a motion under Sec. 2255 was denied without a hearing. In remanding the case for hearing, the Court said (pp. 6, 20, 22):

> "The statute in terms requires that a prisoner shall be granted a hearing on a motion which alleges sufficient facts to support a claim for relief unless the motion and the files and records of the case 'conclusively show' that the claim is without merit.
>
> * * *
>
> "[T]he facts upon which petitioner's claim ... is predicated are outside the record ....
>
> * * *
>
> "If the allegations are true, the petitioner is clearly entitled to relief."

As in Sanders, some of the facts upon which petitioner relies in the instant case are outside the record.

The facts upon which appellant relies are the following. The victim described the robber as a man about five feet seven inches tall, weighing about one hundred forty pounds. About two weeks after the robbery, the police showed the victim a long-range picture of appellant, and the victim could not make a positive identification. (Tr. 45) The police then showed the victim a newspaper picture of appellant, which the victim "was pretty certain" was that of the robber. (Tr. 45) The police then showed the victim several photographs, and the victim picked out a picture of appellant. (Tr. 45, 46) Thereafter, the victim identified appellant in a police line-up.

(Tr. 22, 23) The men in the line-up were not all of the same build, nor were they dressed approximately the same. (Tr. 37) The four other men in the line-up were far heavier and taller than appellant, and they were all dressed in regular street attire, whereas appellant was dressed in beach wear, consisting of a T-shirt, calf length trousers, and shower thongs. Appellant was the only man in the line-up who met the general description of the robber given to the police at the time of the robbery. Appellant had requested the police to be permitted to wear regular street apparel in the line-up, but this request was denied. (Motion of December 4, 1970; Affidavit, Exhibit A)

In the absence of anything in the record to controvert or dispute the allegations in appellant's motion or his affidavit attached hereto as Exhibit A, those allegations should be accepted as true by this court for purposes of determining whether a hearing on the motion should be held. See Machibroda v. United States, supra.

Under the foregoing circumstances, it is clear that the in-court identification of appellant by the victim is tainted by the improper procedures involved in the identification of pictures of appellant and the police line-up identification.

The procedure followed "was so unnecessarily suggestive and conducive to irreparable mistaken identification that he [appellant] was denied due process of law." Stovall v. Denno, 388 U.S. 293, 302 (1967).

Recent decisions of this court are precedents for a remand of this matter for a hearing by the trial court. In Mendoza-Acosta v. United States, 133 U.S.App.D.C. 91, 408 F.2d 1294 (CADC, 1969), three witnesses saw a "Spanish" looking individual with a mustache in the vicinity of the crime. The following day the three witnesses identified appellant in a line-up consisting of appellant (a Mexican with a mustache) and three white men of Anglo Saxon appearance, none of whom had a mustache. The case was remanded to the trial court to determine whether the line-up was so unduly suggestive and conducive to a possible mistaken identification as to be tantamount to a denial of due process of law.

In Gross v. United States, 133 U.S.App.D.C. 94, 408 F.2d 1297 (CADC, 1969), a witness saw a man in front of burglarized premises. He described the man as a Negro in the late twenties, six feet two inches in height, wearing a light colored raincoat, dark broad brimmed hat and dark slacks. Later in the same day the witness identified appellant at the police station. There was no line-up, and appellant was alone in a room. The case was remanded to the trial court to decide at a hearing whether or not a due process violation had occurred, per Stovall.

In Sera-Leyva v. United States, 133 U.S.App.D.C. 125, 409 F.2d 160 (CADC, 1969), a cab driver saw the face of a man who robbed him. On the next day, the witness viewed four photographs and picked out appellant, and on the following

day the witness sat in the United States Commissioner's office until he saw and identified appellant coming through the door. The record was not clear whether the witness saw any other persons coming through the door. The court held that the record was not such that the Court of Appeals could conclude whether the totality of the circumstances violated due process, and the case was remanded for a hearing.

In some Section 2255 cases, this Court has refused to order a hearing on the motion to vacate judgment. These cases can be distinguished from the instant case. In Patton v. United States, 131 U.S.App.D.C. 197, 403 F.2d 923, 926 (CADC, 1968), the victim of a robbery gave a description of the robber, and a few weeks later the victim picked out appellant from a five-man line-up at the police station. A photograph of the line-up was produced at trial and was a part of the record on appeal. Appellant claimed that the line-up was unduly suggestive because the others in the line-up were wholly different from appellant in personal appearance. The court held that the photograph "leaves no room for any serious contention that the police stacked the lineup with people whose physical characteristics were unreasonably different from appellant's."

The determining factor in Patton was the existence in the record of the photograph of the line-up. In the instant case, the photograph of the line-up is not in the record and is not available for viewing by this Court. One of the

reasons for a remand of this matter for a hearing would be to enable the District Court to subpoena the photograph to determine whether it supports the claim of appellant.

In Adams v. United States, 95 U.S.App.D.C. 354, 222 F.2d 45 (CADC, 1954), the Court said at page 47:

> "... No hearing was held on this subject, when raised by appellant's motion. Genuine issues of material fact, raised in a proceeding under Sec. 2255, cannot be resolved without a hearing, followed by findings of fact and conclusions of law."

However, the court said that the record in the case failed to substantiate appellant's claims of incompetence of counsel, and appellant never said what the testimony of an alleged missing witness would have been. The court then ruled at page 48:

> "There was no genuine issue of material fact which required an evidentiary hearing. Summary disposition of futile and groundless motions is permissible under the terms of the statute when 'the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief'."

The instant case differs from the Adams case in that here the motion and records establish the existence of a genuine issue of material fact requiring an evidentiary hearing.

In Williams v. United States, 133 U.S.App.D.C. 185, 409 F.2d 471 (CADC, 1969), two witnesses to a robbery had an excellent view of the robbers for a period of six to ten minutes, and gave a careful description of appellant. There was no identification of photographs. Both witnesses identified appellant in the robbery squad room of the police station.

The court held that even if there was a defect in the confrontation at the police station, there was an independent source for the in-court identifications of such a nature as to dispell any substantial likelihood of misidentification.

In the instant case, one witness (Mrs. Cardia) saw the robber for only a few moments in the hallway, as she ran from the bathroom to the rear door (Tr. 66, 69). Mr. Cardia was lying on the floor of the hallway and the fireplace hearth in the living room for part of the time the robber was there; the length of time the robber was in sight of Mr. Cardia is not known; and the robber was disguised by a mascara "beatnik," a heavy growth of whiskers, and green sunglasses. (Tr. 21, 33) Furthermore, Mr. Cardia was shown a picture of the appellant before he picked out appellant's picture from a group of photographs, and appellant was distinctively and unusually attired in the line-up, in which he was the only person meeting the general description of the robber.

In Solomon v. United States, 133 U.S.App.D.C. 103, 408 F.2d 1306 (CADC, 1969), appellant appealed from the judgment of conviction because of alleged improper identification by a witness named Simms. No hearing was held to elucidate the facts concerning the identification. However, the court found from the trial record that the case against the appellant was "iron-clad," and the identification by Simms "added little to the strong prosecution case." If the identification by Simms was erroneously admitted, the error was harmless beyond a reasonable doubt.

In the instant case, the situation is far different. Here the challenged identification of appellant constitutes the entire case against him. There is no independent or corroborating evidence, and if the identification was erroneous, as claimed, the error was extremely prejudicial.

In Cunningham v. United States, 133 U.S.App.D.C. 133, 409 F.2d 168 (CADC, 1969), the court found from the record a source for the in-court identification independent of the challenged pre-trial identification and concluded that there was "no very substantial likelihood of irreparable misidentification" as a result of the pretrial viewing of appellant.

In the instant case, there is no basis in the record for a finding of a source for the in-court identification independent of the challenged photographic and line-up identifications.

The landmark case of Clemons v. United States, 133 U.S.App.D.C. 27, 408 F.2d 1230 (CADC 1968), does not govern the present appeal. This decision does not involve a motion under Section 2255, and the question of whether an evidentiary hearing should have been held not in issue. In each of the three cases that were there decided, the defendant had made objection at trial to the introduction of identifying testimony, and the trial court, after a full hearing, had determined that no violation of the Due Process provision of the Fourteenth Amendment would exist because of the identification testimony which the court permitted to be introduced in evidence

On appeal, this Court agreed with the findings and rulings of the trial court.

The "totality of circumstances" at trial surrounding the challenged identifications in Clemons are far different from those in the instant case. In Clemons the trial court found independent basis for in-court identification, in addition to the faulty pre-trial confrontations. In the instant case, no claim was made at trial of any Due Process violation, and no hearing or findings were made by the trial court on the issues raised by the motion to vacate judgment. Unlike Clemons, there is no basis in the record for this Court to find that there was no denial of due process.

CONCLUSION

The only evidence of appellant's guilt was the identification of appellant by Mr. and Mrs. Cardia. Mrs. Cardia saw the robber only for a few seconds as she fled from the house. Mr. Cardia was shown two pictures of appellant - a long range photograph and a picture in the newspaper - before he picked out appellant's picture from a group of four or five photographs. There is nothing in the record to controvert or dispute appellant's claim that the line-up was unduly suggestive, in that appellant was distinctively clothed and was the only man in the line-up meeting the general description of the robber, and that the identification procedure was so unduly prejudicial as to deprive appellant of due process of law.

The motion, files, and records of the case do not conclusively show that the prisoner is entitled to no relief; the decision of the District Court denying the motion without a hearing should be reversed; and the case should be remanded for a hearing and the making of findings of fact and conclusions of law with respect thereto, as required by 28 U.S.C. § 2255.

Respectfully submitted,

George B. Haddock
1776 K Street, N. W.
Washington, D. C. 20006
Attorney for Appellant
(Appointed by this Court)

January 22, 1971

Exhibit A

COUNTY OF LEAVENWORTH)
: SS
STATE OF KANSAS)

Donald E. Anderson, being first duly sworn, deposes and says:

I am the appellant in United States v. Donald E. Anderson, Appellant No. 24,506, United States Court of Appeals for the District of Columbia Circuit.

On or about September 9, 1960, I appeared in a police line-up at which time I was identified by Mr. and Mrs. Samuel J. Cardia as the man who had robbed them on August 19, 1960. There were four men in the police line-up in addition to myself, all of whom were taller and heavier than I, and all of whom were dressed in regular street attire. I was dressed in beach wear, consisting of a T-shirt, calf-length trousers and shower thongs, which I had been wearing at the time of my arrest. I made request of the police to be permitted to wear regular street apparel in the line-up, but this request was denied, and I was forced to appear in the line-up in the distinctive attire.

I was the only man in the line-up who met the general description of the robber given to the police by the Cardias at the time of the robbery, i.e., a man approximately five feet seven inches in height, weighing about one hundred forty pounds.

A photograph of the police line-up was introduced in evidence at my trial, and the Cardias identified my picture as that of the man who robbed them.

Donald E. Anderson

Donald E. Anderson

Subscribed and sworn to before me this 2__ day of December, 1970.

Notary Public in and for the
County of Leavenworth, Kansas

PAROLE OFFICER

"A[illegible]
to [illegible]

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,5[illegible]6

UNITED STATES OF AMERICA, *Appellee*

v.

[illegible], *Appellant*

Appeal from the United States District Court for the District of Columbia

---

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
VICTOR W. CAPUTY,
[illegible] ROBINSON,
Assistant United States Attorneys.

INDEX

TABLE OF CASES

OTHER REFERENCES

---

* Cases chiefly relied upon are marked by asterisks.

ISSUE PRESENTED *

In the opinion of the appellee, the following issue is presented:

Whether appellant was entitled to a hearing on his § 2255 petition?

* This case has twice previously been before this Court. On September 26, 1962, the Court vacated appellant's conviction and ordered a new trial. *Anderson* v. *United States*, No. 17,142. On January 19, 1965, the Court affirmed appellant's conviction after the retrial. *Anderson* v. *United States*, No. 18,776. The instant appeal is taken from the denial of a motion to vacate sentence under 28 U.S.C. § 2255.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,506

UNITED STATES OF AMERICA, *Appellee,*

v.

DONALD E. ANDERSON, *Appellant.*

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was indicted in two counts for housebreaking and robbery on September 26, 1960.[1] Jury trial before the Honorable George L. Hart, Jr., began on April 27, 1961, and ended on May 1 with a verdict of guilty as charged. Appellant was sentenced to a prison term of four to fourteen years on each count, the sentences to run concurrently. Appellant appealed, and on September 26, 1962, this Court vacated the judgment of the District Court and ordered a

[1] Appellant was also charged in the same indictment, along with Louis J. Placona, with another count of housebreaking and assault with intent to commit robbery on a different victim at an earlier time. Placona was tried separately from appellant.

new trial. *Anderson* v. *United States*, No. 17,142. On June 9, 1964, the Honorable John J. Sirica heard and granted appellant's motion for severance of counts. Trial began on counts one and two (housebreaking and robbery) before Judge Sirica and a jury on June 9, 1964, and on June 10 the jury returned with a verdict of guilty as charged. On June 29, 1964, the court sentenced appellant to three to ten years on count one and four to fourteen years on count two, to run concurrently. An appeal followed, and the judgment was affirmed by this Court. *Anderson* v. *United States*, No. 18,776, decided January 19, 1965.

On December 10, 1969, appellant filed a *pro se* motion to vacate sentence and judgment under 28 U.S.C. § 2255. Judge Sirica denied the motion on February 19, 1970. On June 24, 1970, a letter dated April 23, 1970, from appellant to Judge Sirica was treated as a motion to reconsider the denial of appellant's earlier motion to vacate sentence and judgment and was denied. Appellant is now before this Court.

The Trial

Samuel J. Cardia lived at 2501 Branch Avenue, S.E., on August 19, 1960. At approximately 9:30 p.m. Mr. Cardia and his wife Virginia were sitting in their well-lit living room when the doorbell rang. Mr. Cardia entered the hallway, turned on the light by the front door and opened the door.[2] Mr. Cardia recognized the stranger at his door as an "undesirable," but before he could close the door, the "undesirable" forced his way into the hallway with the gun he clutched in his hand. The stranger commanded Mr. Cardia to lie on the floor, and Mr. Cardia obeyed (Tr. 17-18). Soon the intruder told Mr. Cardia to get up and go into the living room. Immediately the importunate visitor yanked the phone from the wall and made Mr. Cardia lie on the hearth before the fireplace. All the while, however, the victim was looking at the intruder. He noticed that the stranger wore a gray felt hat, had a "beatnik" beard of mascara drawn on his chin, which complemented

[2] Meanwhile Mrs. Cardia retired to the bathroom (Tr. 65-66).

his "five o'clock shadow beard," was about thirty years old, wore gold-framed, green-lensed Air Force-type sunglasses, sport shoes with a flat rubber heel, chartreuse gloves and a sport coat. The stranger demanded that Mr. Cardia open the safe, but unfortunately there was no safe to open. However, when he grasped the purpose of the intruder's intrusion, Mr. Cardia removed $743, which was three days' proceeds from his barber shop, from a compartment in a desk across the room. The stranger grabbed the money and abruptly left (Tr. 19-35).

Meanwhile Mrs. Cardia had heard the "scuffle" at the front door, looked toward the front entrance and saw "this character" standing over her husband with a pistol in his hand. She fled for help out the back door. Before she left, however, Mrs. Cardia noticed that the pistol-bearer was of small stature with very sharp features and had a "five o'clock shadow beard." The "character" wore a gray hat and dark sunglasses with a gold frame. Mrs. Cardia said the lighting conditions were excellent (Tr. 65-71).

Detective Leonard G. Kragh of the Robbery Squad responded to the Cardia residence and there took a joint description of the robber. The description fixed the thief as a thirty to thirty-five year old white male, about 5'7" or 5'8" tall, with black hair, of medium build, weighing about 140 pounds, wearing makeup on his face, a gray snap brim hat and a sport jacket (Tr. 72-76).[3]

As a result of the picture identifications, appellant was arrested and placed in a lineup with four detectives on

---

[3] On September 2, 1960, there was a picture of appellant in the Evening Star. Mr. and Mrs. Cardia each recognized the man in that photograph as the robber and so advised the police. The police showed them a long-range photograph of a suspect whom they could not identify and then showed the picture of appellant from the newspaper which they did identify. The Cardias were separated from each other when the picture identifications were made. The prosecutor did not elicit testimony regarding the photographic identification from any witness at trial in the jury's presence (Tr. 44-48, 86-87).

Prior to September 2, both the Cardias had pointed out three photographs of men who resembled the robber. They did not make positive identifications, however. It was later developed that none of the three men who resembled the robber could have committed the robbery (Tr. 38-40, 44-48, 85).

September 9, 1960[4] (Tr. 83). Mr. Cardia "took a good look . . . a [*sic*] honest look, and in [his] heart, [he] looked at the man and stared at him to make positive that [he] wasn't picking the wrong man. . . ." The object of that stare was appellant, and Mr. Cardia was positive that it was appellant who robbed him (Tr. 48-49). Equally exact and positive in identifying appellant as the robber was Mrs. Cardia (Tr. 67).

Albert Mattera, a barber and lifelong friend of Mr. Cardia, phoned Cardia six months before the 1964 retrial of appellant and advised Cardia that Mattera had cut appellant's hair. During the haircut appellant asked Mattera if he would call Mr. Cardia and ask him not to prosecute the case if appellant returned the $800 proceeds of the crime. Mr. Mattera placed the call; Mr. Cardia refused the refund offer, and appellant was convicted of robbery and housebreaking[5] (Tr. 54-63, 122).

ARGUMENT

The record and files in this case conclusively show that appellant is entitled to no relief.

(Tr. 17-35, 65-71)

Appellant's sole contention is that the District Court erred in denying his § 2255 petition without holding a hearing. In support of his position he maintains that there was a due process violation in the photographic and lineup identifications of him on September 2 and 9, 1960. Appellant relies, of course, on *Stovall* v. *Denno*, 388 U.S. 293 (1967), but his reliance is misplaced. Simply stated, appellant fails to recognize the overwhelming evidence of an independent source for the identifications by both Mr. and Mrs. Cardia.

---

[4] Detectives Evanoff, Chappel (of the Special Investigative Squad) Jackson and Planconia participated in the lineup with appellant (Tr. 83).

[5] Appellant presented no defense at trial (Tr. 94).

Generally the court must accept the allegations in a § 2255 petition at face value and hold a hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," in which case no hearing is required. In *Machibroda* v. *United States*, 368 U.S. 487 (1962), the Court pointed out:

> What has been said is not to imply that a movant must always be allowed to appear in a district court for a full hearing if the record does not conclusively and expressly belie his claim, no matter how vague, conclusory, or palpably incredible his allegations may be. The language of the statute does not strip the district courts of all discretion to exercise their common sense. 368 U.S. at 495.

This theme was reiterated in the Court's subsequent opinion in *Sanders* v. *United States*, 373 U.S. 1, 21 (1962): "[W]e think it clear that the sentencing court has discretion to ascertain whether the claim is substantial before granting a full evidentiary hearing."

In the case at bar the sentencing judge acted well within his statutory discretion in finding, in effect, that the motion, files, and records of the case conclusively showed that appellant was not entitled to relief. Clearly a reading of the transcript of appellant's trial reveals the frivolity of his § 2255 motion. The room in which the offense took place had "excellent lighting conditions." Mr. Cardia, a barber who noticed facial features, hair, makeup, and beards as a matter of routine, observed that the "character" holding the pistol wore chartreuse gloves, a gray felt hat, sport shoes with a flat rubber heel, and a sport coat. Additionally, but more importantly, Mr. Cardia noticed that the uninvited guest had a "beatnik" beard of mascara drawn on his chin and had a "five o'clock shadow beard." The man wore gold-framed Air Force sunglasses with green lenses. Mrs. Cardia's description of the man who robbed her husband was based on her viewing of the man from a position she occupied unnoticed in the hallway before she fled for help

through the back door. She described the clothing worn by the bandit as precisely as had her husband. She observed that the man was of small stature, with very sharp features, and she too remarked that he had "a five o'clock shadow beard." Both the Cardias were positive that their in-court identifications of appellant were of the man who robbed Mr. Cardia in his own home (Tr. 17-35, 65-71).

We submit that the precise descriptions given by the Cardias were "the kind of distinctive physical or other characteristics that would of itself lead an appellate court to initiate a finding of independent source." *Sera-Leyva* v. *United States*, 133 U.S. App. D.C. 125, 128, 409 F.2d 160, 163 (1969), *aff'd after remand*, 139 U.S. App. D.C. 376, 433 F.2d 534 (1970). Consequently, the record being more than sufficient to establish an independent source for the in-court identifications of appellant,[6] the District Court did not err in denying appellant's § 2255 motion without a hearing.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
VICTOR W. CAPUTY,
KENNETH MICHAEL ROBINSON,
Assistant United States Attorneys.

---

[6] *Cf. Hawkins* v. *United States*, 137 U.S. App. D.C. 103, 420 F.2d 1306 (1969); *Williams* v. *United States*, 133 U.S. App. D.C. 185, 409 F.2d 471 (1969).

☆ U.S. Government Printing Office: 1971—422-599/598